

1992

Dawn Alumbaugh v. Utah State Insurance  
Department, by and through its commissioner and  
Authorized Representative, Harold C. Yancey :  
Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Brent A. Burnett; Assistant Attorney General; Attorney for Appellee.

David H. Schwobe; Perkins, Schwobe & McLachlan; Attorney for Appellant .

---

#### Recommended Citation

Brief of Appellant, *Alumbaugh v. Utah State Insurance Department*, No. 920656 (Utah Court of Appeals, 1992).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/3643](https://digitalcommons.law.byu.edu/byu_ca1/3643)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

920656  
PERKINS, SCHWOBE & McLACHLAN  
David H. Schwobe (#2893)  
Attorney for Appellant  
343 South 400 East  
Salt Lake City, Utah 84111  
Telephone (801) 521-0177

---

IN THE UTAH COURT OF APPEALS

\* \* \* \* \*

DAWN ALUMBAUGH, :

Plaintiff/Appellant, :

vs. :

UTAH STATE INSURANCE :

DEPARTMENT, by and through :

its Commissioner and :

Authorized Representative, :

HAROLD C. YANCEY, :

Defendant/Appellee. :

Case No. 920656-CA

Category No. 15

\* \* \* \* \*

BRIEF OF APPELLANT

---

Appeal from the Judgment of the Third Judicial District  
Court of Salt Lake County, the Honorable Richard H. Moffat

---

Brent A. Burnett  
Assistant Attorney General  
Attorney for Appellee  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1016

David H. Schwobe  
PERKINS, SCHWOBE & McLACHLAN  
Attorney for Appellant  
343 South 400 East  
Salt Lake City, Utah 84111  
Telephone: (801) 521-0177

**FILED**

IAN 13 1993

**COURT OF APPEALS**

PERKINS, SCHWOBE & McLACHLAN  
David H. Schwobe (#2893)  
Attorney for Appellant  
343 South 400 East  
Salt Lake City, Utah 84111  
Telephone (801) 521-0177

---

IN THE UTAH COURT OF APPEALS

\* \* \* \* \*

DAWN ALUMBAUGH,	:	
Plaintiff/Appellant,	:	
vs.	:	
UTAH STATE INSURANCE	:	
DEPARTMENT, by and through	:	
its Commissioner and	:	Case No. 920656-CA
Authorized Representative,	:	
HAROLD C. YANCEY,	:	Category No. 15
Defendant/Appellee.	:	

\* \* \* \* \*

BRIEF OF APPELLANT

---

Appeal from the Judgment of the Third Judicial District  
Court of Salt Lake County, the Honorable Richard H. Moffat

---

Brent A. Burnett  
Assistant Attorney General  
Attorney for Appellee  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1016

David H. Schwobe  
PERKINS, SCHWOBE & McLACHLAN  
Attorney for Appellant  
343 South 400 East  
Salt Lake City, Utah 84111  
Telephone: (801) 521-0177

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION .....	1
STATEMENT OF THE ISSUES .....	1
DETERMINATIVE AUTHORITIES .....	3
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	4
SUMMARY OF ARGUMENT .....	15
ARGUMENT	
POINT I THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S CLAIMS FOR FAILURE TO EXHAUST REMEDIES .....	18
POINT II ALUMBAUGH HAS SUFFICIENTLY STATED A CLAIM UNDER 42 USC SECTION 1983 .....	22
POINT III ALUMBAUGH HAS SUFFICIENTLY STATED A CLAIM FOR VIOLATION OF DUE PROCESS UNDER THE UTAH STATE CONSTITUTION .....	24
POINT IV ALUMBAUGH HAS SUFFICIENTLY STATED A CLAIM FOR BREACH OF IMPLIED CONTRACT .....	24
CONCLUSION .....	26
CERTIFICATE OF MAILING .....	27
ADDENDUM	

AUTHORITIES AND CASES CITED

	<u>Page</u>
<u>Alumbaugh v. White,</u> 800 P.2d 825 (Utah, App. 1990) .....	12
<u>Berube v. Fashion Centre, Ltd.,</u> 771 P.2d 1033 (Utah 1989) .....	24
<u>Hatton-Ward v. Salt Lake City Corporation,</u> 828 P.2d 1071, 182 Utah Adv. Rep. 44 (Utah App. 1992).	18
<u>Holmes v. Wampler,</u> 546 F.Supp. 500-503 (E.D. Va. 1982) .....	20
<u>Lamborn v. Jessop,</u> 631 P.2d 917 (Utah 1981) .....	25
<u>Piacitelli v. Southern Utah State College,</u> 636 P.2d 1063 (Utah 1981) .....	25
<u>St. Benedict's Dev. Co. v. St. Benedict's Hosp.,</u> 811 P.2d 194 (Utah 1991) .....	2
<u>Stana v. School Dist. of City of Pittsburgh,</u> 775 F.2d 122, 129-130 (3rd Cir. 1985) .....	20
<u>Wilder v. Virginia Hosp. Ass'n.,</u> 110 S.C.T. 2510, 2524 (1990) .....	20
<u>Will v. Michigan,</u> 491 U.S. 58 (1989) .....	23
<u>Worrall v. Ogden City Fire Department,</u> 616 P.2d 598 (Utah 1980) .....	24

PERKINS, SCHWOBE & McLACHLAN  
David H. Schwobe (#2893)  
Attorney for Appellant  
343 South 400 East  
Salt Lake City, Utah 84111  
Telephone (801) 521-0177

---

IN THE UTAH COURT OF APPEALS

\* \* \* \* \*

DAWN ALUMBAUGH,	:	
Plaintiff/Appellant,	:	BRIEF OF APPELLANT
vs.	:	
UTAH STATE INSURANCE	:	
DEPARTMENT, by and through	:	
its Commissioner and	:	Case No. 920656-CA
Authorized Representative,	:	
HAROLD C. YANCEY,	:	Category No. 15
Defendant/Appellee.	:	

\* \* \* \* \*

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this Appeal pursuant to Utah Code Annotated Section 78-2a-3(j). This case was assigned to the Court of Appeals by Order of the Utah Supreme Court, dated October 16, 1992.

STATEMENT OF THE ISSUES

1. Was Alumbaugh required to exhaust her remedies under the Utah Grievance and Appeal Procedures Act prior to bringing her claims for violation of Federal and State Due Process and breach of contract?

This issue is purely legal in nature and is, therefore, reviewable under the correction-of-error standard of review, St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1991).

2. Is Alumbaugh excused from exhausting her remedies under the Grievance and Appeal Procedures Act due to the futility of such remedies?

This issue is purely legal in nature and is, therefore, reviewable under the correction-of-error standard of review. Id.

3. Did Alumbaugh adequately exhaust her remedies under the Grievance and Appeal Procedures Act?

This issue is purely legal in nature and is, therefore, reviewable under the correction-of-error standard of review. Id.

4. Has Alumbaugh sufficiently stated a claim for violation of Federal Due Process under 42 USC Section 1983?

This issue is purely legal in nature and is, therefore, reviewable under the correction-of-error standard of review. Id.

5. Has Alumbaugh sufficiently stated a claim for violation of Due Process under the Utah Constitution?

This issue is purely legal in nature and is, therefore, reviewable under the correction-of-error standard of review. Id.

6. Has Alumbaugh sufficiently stated a claim for breach of an implied contract of employment?

This issue is purely legal in nature and is, therefore, reviewable under the correction-of-error standard of review. Id.

#### DETERMINATIVE AUTHORITIES

Alumbaugh submits that the following constitutional provisions, statutes and rules are determinative of certain issues in this Appeal. Due to their length, such authorities are set forth verbatim within the Addendum hereto, at pages 1-13:

Constitution of Utah, Article I, Section 7.

UCA Section 67-19a-101 to 67-19a-408.

Utah Grievance and Appeal Procedures Act.

#### STATEMENT OF THE CASE

Alumbaugh alleges in this action that she was involuntarily transferred from her job position within the Solvency Division of the Utah State Department of Insurance ("Department of Insurance" or "Defendant") to a position within the Market Conduct Division of the Department of Insurance during April of 1990, and that she was subsequently given an unfavorable written evaluation and denied an opportunity for a promotion within the Solvency Division. Alumbaugh alleges that such acts were in violation of several Rules of the Utah Department of Human Resource Management and several provisions of an Employee Handbook which was issued by the Department of Human Resource Management, and which governed Alumbaugh's employment with the Department of Insurance. Alumbaugh alleges that Defendant's violation of such Rules and



Handbook provisions constituted a denial of Alumbaugh's right of due process under the Constitutions of the United States and the State of Utah, and breach of an implied contract of employment.

Alumbaugh filed her Complaint in the District Court, alleging claims for violation of Federal Due Process and Breach of Contract on December 26, 1991. Alumbaugh subsequently filed an Amended Complaint, which added a claim for violation of State Due Process. Defendant filed Motions to Dismiss each of Alumbaugh's claims on various grounds. Following the submission of supporting and opposing memoranda by both parties and oral argument, the District Court issued its Order of Dismissal, dated July 10, 1992. Said Order of Dismissal, a true and correct copy of which appears in the Addendum hereto at pages 14-15, dismisses each of Alumbaugh's claims without prejudice for failure to exhaust administrative and statutory remedies.

#### STATEMENT OF THE FACTS

1. During approximately November of 1981 Alumbaugh commenced her employment as a Grade 13 Office Technician within the Department of Insurance. (Amended Complaint, Para. 1; R. 65.)

2. Subsequent to the commencement of her employment, Alumbaugh received several promotions and upgrades, culminating in her promotion to the position of Grade 15 Insurance Technician

within the Solvency Division of the Utah State Department of Insurance on or about November 12, 1983. (Amended Complaint, Para. 2; R. 65.)

3. During approximately November of 1989, Vanna Hunter ("Hunter") became employed as Alumbaugh's immediate supervisor within the Solvency Division. Also during approximately November of 1989, Leonard Stillman ("Stillman") became the Director of the Solvency Division and was Hunter's direct supervisor. (Amended Complaint, Para. 3; R. 65.)

4. Subsequent to the commencement of Hunter's and Stillman's employment in the Solvency Division, Alumbaugh was assigned to perform additional responsibilities and was required to undergo training related to such additional responsibilities. (Amended Complaint, Para. 4; R. 65.)

5. On or about February 20, 1990 Alumbaugh met with Stillman and informed Stillman that, in Alumbaugh's opinion, Hunter had not sufficiently communicated Alumbaugh's new job responsibilities to Alumbaugh, that Hunter had been excessively critical of Alumbaugh's work performance, and that Hunter had not adequately trained Alumbaugh in relation to Alumbaugh's new job responsibilities. In reply to Alumbaugh's comments, Stillman asked Alumbaugh if she would like a transfer to a new position. Alumbaugh inquired as to the specific nature of the transfer, and Stillman said that he would talk to Personnel Director, Olga Tsakakis ("Tsakakis"), and would get back to Alumbaugh within

thirty (30) days. Alumbaugh then stated that if she were to transfer, she would want to remain within the Solvency Division. (Amended Complaint, Para. 5; R. 66.)

6. Several days after Alumbaugh's meeting with Stillman, as referred to in the immediately preceding paragraph hereof, Alumbaugh contacted Tsakakis regarding the potential transfer that Stillman had proposed. In response to Alumbaugh's statement, Tsakakis said that she was unaware of any transfer opportunities existing at that time. Tsakakis further stated that any proposed transfer would require input from the employee who was to be transferred. (Amended Complaint, Para. 6; R. 66.)

7. On or about March 20, 1990 Alumbaugh was called into a meeting with Commissioner Harold C. Yancey ("Yancey"), during which Yancey stated that Hunter had informed him of certain alleged deficiencies in Alumbaugh's work performance and that Yancey wanted Alumbaugh to transfer to a Grade 15 Insurance Technician position within the Market Conduct Division, which position was then held by employee Sandra Christensen ("Christensen"), and that Christensen would be transferred to Alumbaugh's position in the Solvency Department. In response to Yancey's statement, Alumbaugh asked what would happen if she refused the transfer, upon which Yancey stated that if Alumbaugh chose to remain in her current position, and did not meet the job specifications for that position within six (6) to eight (8) months, Alumbaugh's employment would be terminated. Yancey then

gave Alumbaugh a copy of the job description for the position in the Market Conduct Division, to which he proposed to transfer Alumbaugh. Upon review of said job description, Alumbaugh stated to Yancey that the transfer was a demotion, in response to which Yancey stated that the position was not a demotion because Alumbaugh would not lose any wages or benefits. Alumbaugh then stated that she would accept the transfer under protest because it was apparent that Yancey intended to terminate Alumbaugh's employment if she did not accept the transfer. Alumbaugh further stated that she would file a grievance in relation to the transfer. (Amended Complaint, Para. 7; R. 66-67.)

8. On or about April 3, 1990 Alumbaugh commenced her employment as a Grade 15 Insurance Technician within the Market Conduct Division. Upon information and belief, Christensen commenced work in Alumbaugh's former position within the Solvency Division on the same date. (Amended Complaint, Para. 8; R. 67-68.)

9. On or about April 6, 1990 Alumbaugh filed a grievance, pursuant to the Utah Grievance and Appeals Procedure Act, UCA Section 67-19a-101 et seq., in which Alumbaugh alleged that her transfer to the Market Conduct Division was involuntary, was implemented without sufficient notice of any deficiency in Alumbaugh's work performance and without affording Alumbaugh an opportunity to improve any deficiency in her work performance, in

violation of various rules and policies of the Department of Insurance and the Department of Human Resource Management. (Amended Complaint, Para. 9; R. 68.)

10. On or about April 9, 1991 Alumbaugh was given a written Performance Evaluation which had been prepared by Hunter, and which purported to review Alumbaugh's work performance during the period of October 1, 1989 to April 1, 1990. While such evaluation rated Alumbaugh's overall work performance as "successful," the evaluation contained several statements which were highly critical of Alumbaugh's work performance. Subsequent to the issuance of said evaluation, Alumbaugh alleged within her grievance that such evaluation had been issued in retaliation for the filing of her grievance. (Amended Complaint, Para. 10; R. 68.)

11. On or about September 5, 1990 Christensen was promoted to the position of Grade 19 Insurance Forms Technician within the Department of Insurance. Upon information and belief, such promotion was implemented in a manner which was not consistent with established policies of the Department of Insurance and the Utah Department of Human Resource Management, in that such promotion was not authorized by the Department of Human Resource Management, and in that Christensen was pre-selected for the position to the exclusion of other qualified potential applicants, including Alumbaugh. (Amended Complaint, Para. 11; R. 68-69.)

12. On or about October 26, 1990, Alumbaugh's former position of Grade 15 Insurance Technician within the Solvency Division, which Christensen had held prior to her promotion to Insurance Forms Technician, was "reclassified" to a Grade 15 Secretary position. (Amended Complaint, Para. 12; R. 69.)

13. Upon information and belief, the Grade 19 Insurance Forms Technician and the Grade 15 Secretary position, which were created subsequent to Alumbaugh's transfer from the Solvency Division, each performed some of the duties which Alumbaugh previously performed as a Grade 15 Insurance Technician within the Solvency Division. (Amended Complaint, Para. 13; R. 69.)

14. The position to which Alumbaugh was transferred within the Market Conduct Division, on or about April 3, 1990, requires less technical expertise, and provides fewer opportunities for advancement and promotion than Alumbaugh's former position in the Solvency Division. (Amended Complaint, Para. 14; R. 69.)

15. Following the filing of Alumbaugh's grievance, said grievance proceeded through the first four levels of appeal as specified by the Utah Grievance and Appeal Procedures Act, UCA 47-19a-402, which consisted of review by Alumbaugh's line management, who held that Plaintiff's transfer had been voluntary. (Plaintiff's Memorandum in Opposition to Defendant's

Motion to Dismiss [hereinafter cited as "Plaintiff's Memo"], page 3; R. 27.)<sup>1</sup>

16. On May 11, 1990 Alumbaugh filed a request with the Utah Career Service Review Board to advance her grievance to Level 5 pursuant to UCA Section 67-19a-402(5). (Plaintiff's Memo., pages 3-4; R. 27-28.)

17. On May 21, 1990 the Career Service Review Board, per Administrator Robert N. White, issued a Jurisdictional Decision and Summary Ruling ("Jurisdictional Decision"), which held in essence that the Career Service Review Board had no jurisdiction over Alumbaugh's claims pursuant to UCA Section 67-19a-302(1). Said Jurisdictional Decision states in part:

---

<sup>1</sup>Alumbaugh's grievance proceeding culminated in a summary ruling by the Utah Career Service Review Board that the Board lacked jurisdiction over Alumbaugh's claims. Alumbaugh subsequently appealed the decision of the Career Service Review Board to the Utah Court of Appeals. The Court of Appeals held that the Jurisdictional Decision of the Career Service Review Board constituted an informal adjudicative determination pursuant to UCA Section 63-46b-15, for which review must be sought in the District Court, rather than in the Court of Appeals. See Alumbaugh v. White, 800 P.2d 825 (Utah App. 1990). Alumbaugh subsequently filed a Petition for Review of the Career Service Review Board's decision in the Third District Court. See Alumbaugh v. White, Case No. 910902395AA. Said Petition for Review was dismissed without prejudice on November 18, 1992. Alumbaugh's grievance proceeding and related appeals to the Utah Court of Appeals and the District Court are hereinafter collectively referred to as "Alumbaugh I." Alumbaugh respectfully requests that this Court take judicial notice of the records and files in Alumbaugh I pursuant to Rule 201 of the Utah Rules of Evidence.

[I]t is concluded that Grievant's requested remedies are inappropriate to the Grievance Procedures based on the following:

(a) Requests for desk audits and all classification appeals are not within the scope of the Insurance Department, but require application to DHRM (Section 67-19-31 and R468-4-5), nor do these matters come under the jurisdiction of the CSRB.

(b) The CSRB lacks remedy powers over monetary awards for embarrassment and emotional distress. Such complaints may be petitioned through the general courts. The CSRB may not even award attorney's fees. (Section 67-19a-408(4).)

(c) Any future salary increases are a prospective (future-oriented) matter, and the award or lack of award of future increases can only be treated at the time of occurrence. Grievant's requested remedy anent future salary increases is now premature. A grievance may always be filed coincident with any future award or the denial of an award on salary increase matters, but there is no present injury or harm cited in the instant grievance which may be treated at this time. (Plaintiff's Memo., Exhibit "A," R. 47-54.)<sup>2</sup>

18. On June 19, 1990 Alumbaugh filed a Petition for Review in the Utah Court of Appeals, in which Alumbaugh sought reversal of Administrator White's Jurisdictional Decision. On October 20, 1990 the Court of Appeals issued an opinion which held, in essence, that the Jurisdictional Decision and Summary Decision of the Career Service Review Board constituted an informal adjudicative proceeding, for which review must be sought in the District Court, rather than in the Court of Appeals,

---

<sup>2</sup>A true and correct copy of said Jurisdictional Decision is contained within the Addendum hereto at pages 16-23.



pursuant to Utah Code Annotated Section 63-46d-5. Therefore, Alumbaugh's Petition for Review was transferred by the Court of Appeals to the Third District Court. See Alumbaugh v. White, 800 P.2d 825 (Utah, App. 1990). (Plaintiff's Memo., page 5; R. 29.)

19. On April 12, 1991 Alumbaugh filed a Petition for Review of the May 21, 1990 Jurisdictional Decision and Summary Ruling in the Third District Court of Salt Lake County, State of Utah, Case No. 910902395AA. (Plaintiff's Memo., page 5; R. 29.) Alumbaugh's grievance proceeding under the Grievance and Appeal Procedures Act and related appeals to the Utah Court of Appeals and the District Court are collectively referred to herein as "Alumbaugh I."

20. On September 24, 1991 Alumbaugh filed in Alumbaugh I a Motion for Leave to File a Second Amended Complaint which, in essence, sought to add some of the claims which Alumbaugh has alleged in the present action (i.e., for violation of Federal Due Process and breach of contract) to her Petition for Review of the Jurisdictional Decision. The Defendant opposed said Motion, asserting that Alumbaugh could not join such claims with her Petition for Review. On November 8, 1991 the Court in Alumbaugh I issued its Minute Entry, which denied Alumbaugh's Motion for Leave to File a Second Amended Complaint. (Plaintiff's Memo., pages 5-6; R. 29-30.)

21. Alumbaugh commenced the present action on December 26, 1991. Alumbaugh's original Complaint alleged two Causes of Action: for violation of Federal Due Process pursuant to 42 USC Section 1983 and for breach of contract.

22. On February 24, 1992 Defendant filed a Motion to Dismiss both Causes of Action within Alumbaugh's Complaint on the following grounds:

(a) That a state cannot be held liable under 42 USC Section 1983.

(b) That the terms of Alumbaugh's employment are governed by statute and rule; therefore, no contractual obligation could exist between Alumbaugh and Defendant.

(c) That Alumbaugh has not exhausted her administrative remedies inasmuch as the Jurisdictional Decision of the Career Service Review Board is currently on review in the District Court. (R. 13-23.)

23. On March 11, 1992 Alumbaugh filed a Memorandum in Opposition to Defendant's Motion to Dismiss, dated March 11, 1992, wherein Alumbaugh contested each of the asserted grounds for dismissal within Defendant's Motion to Dismiss. Specifically, Alumbaugh argued:

(a) That exhaustion of remedies under the Utah Grievance and Appeal Procedures Act is not a prerequisite for the assertion of her constitutional and contract claims.

(b) That Alumbaugh should be excused from any exhaustion requirement because the Grievance and Appeal Procedures Act provides no remedy to Alumbaugh and exhaustion of such procedures would be futile.

(c) That Alumbaugh has exhausted any remedy which she may be required to exhaust under the Grievance and Appeal Procedures Act.

(d) That Alumbaugh has sufficiently stated a claim for injunctive relief under 42 USC Section 1983.

(e) That Alumbaugh has sufficiently stated a claim for breach of contract. (R. 25-56.)

24. On March 17, 1992 Alumbaugh filed an Amended Complaint which was identical to her original Complaint, except that it added a Third Cause of Action for violation of Due Process under the Utah State Constitution. (R. 64-74.)

25. On March 24, 1992 Defendant filed a Motion to Dismiss the Third Cause of Action within Alumbaugh's Amended Complaint on the grounds that a claim based upon the Utah Constitution should not be recognized where the Utah Grievance and Appeal Procedures Act provides a remedy for the injuries claimed by Alumbaugh. (R. 75-86.)

26. Following the submission of responsive memoranda by both parties, Defendant's Motions to Dismiss came for hearing before the District Court, the Honorable Richard J. Moffat

presiding, on June 12, 1992. After oral argument, Judge Moffat ruled that Alumbaugh had not exhausted her administrative and statutory remedies, and that Alumbaugh's Amended Complaint was, therefore, dismissed without prejudice. (R. 122.)

27. On July 10, 1992 the District Court, per Judge Moffat, issued its Order of Dismissal, which constitutes the final order from which this Appeal is taken. Said Order of Dismissal states in relevant part: "Defendant's Motion to Dismiss the Amended Complaint is granted for the reason that Plaintiff has failed to exhaust the administrative and statutory remedies for the review of grievance procedures." (R. 123-124.) (See Addendum, pages 14-15.)

28. On November 18, 1992 the District Court, per the Honorable David S. Young, dismissed the Petition for Review in Alumbaugh I without prejudice, for the reason that Alumbaugh wishes to hold such Petition in abeyance pending the determination of her rights in this Appeal.

#### SUMMARY OF ARGUMENT

##### POINT I

Alumbaugh was not required to exhaust any remedy which she may have under the Utah Grievance and Appeal Procedures Act prior to bringing suit upon her constitutional and contract claims. The Grievance and Appeal Procedures Act contains no provision limiting the availability of constitutional or common law

remedies. To the contrary, the language of the act is consistently permissive in nature, e.g., "the employee may submit the grievance in writing to the administrator. . . ." UCA Section 67-19a-402(5) (emphasis added). Further, the Grievance and Appeal Procedures Act has no application to Alumbaugh's claim for violation of Federal Due Process under 42 USC Section 1983.

#### POINT II

Even if exhaustion of remedies under the Grievance and Appeal Procedures Act is required in some circumstances, it should not be required in the present case. As it appears from the express provisions of the Act, and as reflected within the Career Service Review Board's Jurisdictional Decision, the Board lacks authority to order any substantive relief for the injuries alleged by Alumbaugh in this case. Therefore, exhaustion of such remedies would be futile.

#### POINT III

Even if Alumbaugh was required to exhaust her remedies under the Grievance and Appeal Procedures Act, she has already done so, by processing her grievance to the Career Service Review Board, which has held that it lacks jurisdiction over Alumbaugh's claims. Alumbaugh's only remaining recourse is to the District Court, where she should be allowed to bring any claims which she may have arising from her alleged injuries.

#### POINT IV

Alumbaugh has sufficiently stated a claim for violation of Federal Due Process. Defendant has argued that a cause of action under 42 USC Section 1983 is unavailable against the State of Utah, and Alumbaugh has contested this point. Although the District Court did not expressly decide this issue, this issue was raised within the District Court and is potentially dispositive of Alumbaugh's Federal Due Process claim.

#### POINT V

Alumbaugh has sufficiently stated a claim for violation of State Due Process. Defendant argued in the District Court that a cause of action under the Due Process clause of the Utah Constitution should not be recognized where a statutory remedy exists for the alleged injuries. However, Alumbaugh submits that she has no substantive remedy under the Grievance and Appeal Procedures Act and must therefore be allowed a cause of action under the Utah Constitution. Although the District Court did not expressly decide this issue, this issue was raised within the District Court and is potentially dispositive of Alumbaugh's State Due Process claim.

#### POINT VI

Alumbaugh has sufficiently stated a claim for breach of contract. Defendant argued in the District Court that a breach of contract claim is unavailable where the terms and conditions

of employment are governed by statute or rule, and Alumbaugh has contested this point. Although the District Court did not expressly decide this issue, this issue was raised in the District Court and is potentially dispositive of Alumbaugh's breach of contract claim.

#### ARGUMENT

##### I. THE DISTRICT COURT ERRED IN DISMISSING ALUMBAUGH'S CLAIMS FOR FAILURE TO EXHAUST REMEDIES

###### A. Alumbaugh Was Not Required to Exhaust Her Remedies Under the Utah Grievance and Appeal Procedures Act Prior to Asserting Her Constitutional and Contract Claims.

Defendant argued in the District Court that Alumbaugh should be required to exhaust her remedies under the Grievance and Appeal Procedures Act, UCA Section 67-19a-101, et seq., prior to bringing her constitutional and contract claims. See Memorandum in Support of Defendant's Motion to Dismiss ("Defendant's Memo," pages 7-9), and Reply Memorandum in Support of Defendant's Motion to Dismiss ("Defendant's Reply Memo."), pages 3-6, 21-23 (R. 59-62). However, Defendant cited no reason or authority in support of such position.

In Hatton-Ward v. Salt Lake City Corporation, 828 P.2d 1071, 182 Utah Adv. Rep. 44 (Utah App. 1992), this Court held that a plaintiff was not required to exhaust his administrative remedies in the Civil Service Commission prior to bringing a judicial action under the State whistle-blower statute. In so holding, the Court stated at page 1073:

Nothing in the language of the civil service statute empowers the Commission to hear certain claims specified in the whistle blower statute such as threats and discrimination made in retaliation for whistle blowing. Neither does the language of the civil service statute suggest that the Commission is empowered to provide any remedy other than those related to reinstatement. In particular, the Commission is barred from granting attorney fees, which may be awarded in the whistle blower statute, as well as civil damages, and civil fines.

We note that here, Hatton-Ward is not seeking reinstatement, but rather civil damages and attorney fees. Thus, it makes no sense to require him first to go to the Commission to pursue a remedy he does not want. The law does not require the exhaustion of administrative remedies when it would serve no useful purpose. Moreover, once an employee brings an action before the Commission, he or she is then entitled only to a review of whether the Commission exceeded its discretion and jurisdiction. We thus see nothing in the plain and unambiguous language of either the whistle blower statute or the civil service statute suggesting a claimant must first bring a whistle blower claim to the Commission before proceeding in state court. (Citations deleted.)

The reasoning which was applied in Hatton-Ward is equally compelling in the present case. Like the Civil Service statute which was at issue in Hatton-Ward, the remedies which are authorized under the Grievance and Appeal Procedures Act are very limited. The only provisions of the Act which may be construed as authorizing any remedy are UCA Section 67-19a-408, which implies that the Board may order the placement of a grievant on the reappointment roster and back wages and benefits, and 67-19a-303(4)(c), which implies that the Board may rescind any disciplinary action against an employee. The Act contains no remedy relating to allegedly non-disciplinary transfers, retaliatory evaluations or pre-selected promotions.



The Career Service Review Board's Jurisdictional Decision in this case emphasized its inability to order any type of substantive relief for the injuries alleged by Alumbaugh. Specifically, the Administrator held that he lacks authority to award monetary damages or prospective relief. (R. 47-54.) (See Addendum at pages 22-23.)

Given these limitations upon the remedies under the Grievance and Appeal Procedures Act, it is clear that the Act was not intended to provide relief for the type of constitutional and rule violations which Alumbaugh alleges in this case.<sup>3</sup> There is nothing within the Act which can reasonably be construed as supplanting or limiting other remedies which may be available outside of the Act.

Even if exhaustion of remedies under the Grievance and Appeal Procedures Act is required in some circumstances, it should not be applied to Alumbaugh's Federal Due Process claim under 42 USC Section 1983. It is generally held that exhaustion of state administrative remedies is not a prerequisite to claims under Section 1983. Wilder v. Virginia Hosp. Ass'n., 110 S.C.T. 2510, 2524 (1990); Stana v. School Dist. of City of Pittsburgh, 775 F.2d 122, 129-130 (3rd Cir. 1985); Holmes v. Wampler, 546 F.Supp. 500-503 (E.D. Va. 1982). Defendant did

---

<sup>3</sup>Defendant has not argued that it did not violate the Rules and Employee Handbook provisions as Alumbaugh alleges, nor has Defendant argued that Alumbaugh does not have a constitutionally protected property and liberty interest in her employment.

not address this point in the District Court, and the District Court's dismissal of Alumbaugh's Section 1983 claim was clearly erroneous.

B. Alumbaugh Should be Excused from Exhausting Her Remedies Under the Grievance and Appeal Procedures Act Due to the Futility of Such Remedies.

As the Court noted in Hatton-Ward, 828 P.2d at 1073, "The law does not require the exhaustion of administrative remedies when it would serve no useful purpose." In the present case, any procedures to which Alumbaugh may be entitled under the Grievance and Appeal Procedures Act are rendered futile by the unavailability of any substantive remedy under the Act.

Defendant argued in the District Court that, contrary to the ruling of the Career Service Review Board, Alumbaugh's claims fall within the Board's jurisdiction. (R. 59-62.) Alumbaugh agrees that the Board's ruling as to jurisdiction is erroneous, and that the Board probably does have jurisdiction over Alumbaugh's claims pursuant to UCA Section 67-19a-302(1). However, the important point is that, even if the Board has jurisdiction, it lacks statutory authority to order any relief for all or most of the injuries which Alumbaugh alleges. Alumbaugh should not be required to exhaust a procedure which, though available, provides no adequate remedy.

C. Alumbaugh Has Sufficiently Exhausted Her Administrative Remedy.

Alumbaugh argued in the District Court that she sufficiently exhausted her administrative remedies before filing the present action (R. 97). Alumbaugh processed her grievance through the first four levels as required by UCA Section 67-19a-402. Alumbaugh then sought review by the Career Service Review Board pursuant to 67-19a-403. The Board ruled that it lacks jurisdiction. After such ruling, Alumbaugh's sole recourse is to the District Court, where Alumbaugh should be allowed to bring any claim which she has arising from the alleged injuries. Alumbaugh fully exhausted her administrative procedures under the Grievance and Appeal Procedures Act.

All of the cases which Defendant has cited on the exhaustion issue involve situations wherein the petitioner sought Court review of an agency decision before the agency had fully completed its processing of the claim. (See Defendant's Memo, pages 7-8, R. 21-22 and cases cited therein.) Such is not the situation in the present case, where the Career Service Review Board has reached a final determination upon Alumbaugh's claims. Defendant has not addressed the issue of whether Alumbaugh has in fact exhausted her administrative remedies.

II. ALUMBAUGH HAS SUFFICIENTLY STATED A CLAIM UNDER 42 USC SECTION 1983

Defendant argued in the District Court that a cause of action under 42 USC Section 1983 will not lie against the State

of Utah (R.17). In support of this position, Defendant cites the U.S. Supreme Court case of Will v. Michigan, 491 U.S. 58 (1989). However, as Alumbaugh observed in the District Court, Will only prohibits an award of damages against state governments under Section 1983. Will does not alter the long-established rule that injunctive relief may be ordered against a state under Section 1983. Will v. Michigan, 491 U.S. at 71, note 10.

In response to this point, Defendant argued in the District Court that the injunctive relief which Alumbaugh seeks in this case is not "prospective," and therefore may not be obtained under Section 1983. Defendant states on page 2 of its Reply Memo (R. 58):

In the instant case, plaintiff's complaint does not seek prospective relief. Rather, plaintiff requests this Court to adjudicate whether the State violated her due process rights when she was transferred to another position of employment within the State agency.

Defendant has identified no meaningful distinction between the type of injunctive relief which Alumbaugh seeks in this case and the type of injunctive relief which is typically awarded under Section 1983. Defendant erroneously states that injunctive relief under Section 1983 is limited to "declaratory" injunctive relief, and not "compensatory" injunctive relief. (Defendant's Reply Memo, page 2, note 1, R. 58.) However, the cases decided under Section 1983 reflect no such distinction, nor has Defendant cited any authority in support of this assertion. Alumbaugh has

sufficiently stated a claim for injunctive relief under Section 1983.

III. ALUMBAUGH HAS SUFFICIENTLY STATED A CLAIM FOR VIOLATION OF DUE PROCESS UNDER THE UTAH STATE CONSTITUTION

The Utah Supreme Court has held that a claim under the Due Process clause of the Utah Constitution, Article I, Section 7, may arise in the public employment context. Worrall v. Ogden City Fire Department, 616 P.2d 598 (Utah 1980).

Defendant conceded in the District Court that such a claim may be available in some circumstances, but argued that such a claim should not be recognized where the Plaintiff has available a statutory remedy which adequately vindicates the asserted constitutional right. (R. 81-82.)

Alumbaugh does not disagree with the general proposition stated by Defendant. However, Alumbaugh submits that she has no adequate statutory remedy in this case and that, as a result, she has sufficiently stated a claim under the Utah Constitution.

IV. ALUMBAUGH HAS SUFFICIENTLY STATED A CLAIM FOR BREACH OF IMPLIED CONTRACT

Alumbaugh argued in the District Court that the Rules and Employee Handbook, which were promulgated by the Utah Department of Human Resource Management, and which governed Alumbaugh's employment with the Department of Insurance, established an implied contract of employment pursuant to Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989). (R. 39-40.)

Defendant's only argument on this issue is that no implied contract of employment can exist where the employment relationship is governed by statute and rule (R. 17-21). However, all of the cases which Defendant has cited on this point involve situations in which the Plaintiff sought to enforce a contract which was in conflict with a controlling statute, e.g., Lamborn v. Jessop, 631 P.2d 917 (Utah 1981). In the present case, Alumbaugh seeks to enforce an implied contract which is entirely consistent with and in fact arises from the Rules and Handbook which have been promulgated by the Department of Human Resource Management pursuant to its statutory authority. Defendant has made no argument that the contractual rights asserted by Alumbaugh are in any way inconsistent with her statutory rights.

In Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981), the plaintiff alleged that the defendant's Personnel Policies and Procedures had created an implied contract of employment, which had been violated by defendant in terminating the plaintiff's employment. In upholding the District Court's Judgment in favor of the plaintiff, the Utah Supreme Court stated:

This finding comports with the numerous holdings that an educational institution may undertake a contractual obligation to observe particular termination formalities by adopting procedures or by promulgating rules and regulations governing the employment relationship. (Citations deleted.)

The Piacitelli Court proceeded to distinguish between the plaintiff's claims under 42 USC Section 1983 and for breach of contract, and awarded the plaintiff lost wages exclusively under the contract theory. Id. at 1068-1070.

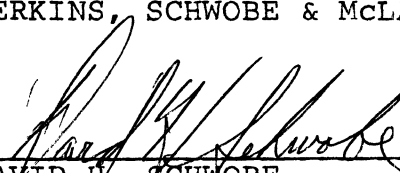
Defendant attempts to distinguish Piacitelli on page 5 of its Reply Memo (R. 61), by stating that teaching positions are exempted from the State career service provisions pursuant to UCA Section 67-19-15(h). While this is true, it is equally true that teaching positions are subject to extensive statutory control. For example, UCA Section 53A-8-101 et seq. establishes a detailed administrative procedures for employment-related grievances pertaining to teaching positions, yet the existence of such remedies did not defeat the Plaintiff's contract claim in Piacitelli.

#### CONCLUSION

Based upon the foregoing authorities, facts and argument, Alumbaugh respectfully requests that this Honorable Court reverse the District Court's Order of Dismissal in its entirety and remand this case to the District Court for consideration of the merits of Alumbaugh's claims.

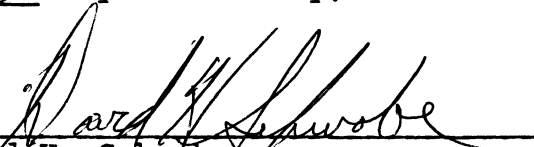
DATED this 13 day of January, 1993.

PERKINS, SCHWOBE & McLACHLAN

  
\_\_\_\_\_  
DAVID H. SCHWOBE  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, to Brent A. Burnett, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 this 13 day of January, 1993.

  
\_\_\_\_\_  
David H. Schwobe



ADDENDUM

	<u>Page No.</u>
Constitution of Utah, Art. I, Section 7 . . . . .	1
Utah Grievance and Appeal Procedures Act,	
UCA Section 67-19a-101-67-19a-408 . . . . .	2-13
Order of Dismissal, dated July 10, 1992 . . . . .	14-17
Jurisdictional Decision and Summary Ruling,	
dated May 21, 1990 . . . . .	18-23

COLLATERAL REFERENCES

**Utah Law Review.** — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.

**Am. Jur. 2d.** — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

**C.J.S.** — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 6.

**A.L.R.** — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

**Key Numbers.** — Constitutional Law ⇐ 83(1), 121 to 123.

**Sec. 6. [Right to bear arms.]**

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

**History:** Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.

**Compiler's Notes.** — Laws 1983, Senate

Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.

Regulation of right to bear arms.

**Prospective application.**

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

**Regulation of right to bear arms.**

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

**Utah Law Review.** — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

**Am. Jur. 2d.** — 79 Am. Jur. 2d Weapons and Firearms § 4.

**C.J.S.** — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.

**A.L.R.** — Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

**Key Numbers.** — Constitutional Law ⇐ 82; Weapons ⇐ 1, 3, 6 et seq.

**Sec. 7. [Due process of law.]**

No person shall be deprived of life, liberty or property, without due process of law.

**History:** Const. 1896.

**Cross-References.** — Eminent domain generally, § 78-34-1 et seq.

## GRIEVANCE AND APPEAL PROCEDURES

67-19-40

**History:** C. 1953, 67-19-38, enacted by L. 1990, ch. 280, § 7. came effective on April 23, 1990, pursuant to Utah Const., Art. VI, Sec. 25.  
**Effective Dates.** — Laws 1990, ch. 280 be-

### 67-19-39. Exemptions.

Peace officers, as defined under Section 77-1a-1, acting in their official capacity as peace officers in undercover roles and assignments, are exempt from the provisions of this act.

**History:** C. 1953, 67-19-39, enacted by L. 1990, ch. 280, § 8. **Effective Dates.** — Laws 1990, ch. 280 became effective on April 23, 1990, pursuant to Utah Const., Art. VI, Sec. 25.  
**Meaning of "this act."** — The phrase "this act" means Laws 1990, ch. 280 which enacted §§ 67-19-33 through 67-19-39.

### 67-19-40. State benefits for servicemembers activated due to Operation Desert Shield and Operation Desert Storm.

- (1) All agencies may continue to pay, for employees activated due to Operation Desert Shield and Operation Desert Storm, their portion of:
  - (a) the premium for health and dental insurance; and
  - (b) the premium for the basic life insurance provided by the state.
- (2) All agencies may also grant the 15-day military leave for employees activated due to Operation Desert Shield and Operation Desert Storm.

**History:** C. 1953, 67-19-40, enacted by L. 1991, ch. 253, § 2. came effective on April 29, 1991, pursuant to Utah Const., Art. VI, Sec. 25.  
**Effective Dates.** — Laws 1991, ch. 253 be-

## CHAPTER 19a GRIEVANCE AND APPEAL PROCEDURES

### Part 1

#### General Provisions

Section	
67-19a-101.	Definitions.
<b>Part 2</b>	
<b>Career Service Review Board</b>	
67-19a-201.	Career Service Review Board created — Members — Appointment — Removal — Terms — Organization — Compensation.
67-19a-202.	Powers — Jurisdiction.
67-19a-203.	Rulemaking authority.
67-19a-204.	Administrator — Powers.

### Part 3

#### Grievance and Appeal Procedures

Section	
67-19a-301.	Charges submissible under grievance and appeals procedure.
67-19a-302.	Levels of appealability of charges submissible under grievance and appeals procedure.
67-19a-303.	Employees' rights in grievance and appeals procedure.

### Part 4

#### Procedural Steps to Be Followed by Aggrieved Employee

67-19a-401.	Time limits for submission of
-------------	-------------------------------

Section		Section	
	appeal by aggrieved employee — Voluntary termination of employment — Group grievances.	67-19a-406.	Procedural steps to be followed by aggrieved employee — Hearing before hearing officer — Evidentiary and procedural rules.
67-19a-402.	Procedural steps to be followed by aggrieved employee.	67-19a-407.	Appeal to Career Service Review Board.
67-19a-403.	Appeal to administrator — Jurisdictional hearing.	67-19a-408.	Career Service Review Board hearing — Evidentiary and procedural rules.
67-19a-404.	Administrator's responsibilities.		
67-19a-405.	Prehearing conference.		

## PART 1

### GENERAL PROVISIONS

#### 67-19a-101. Definitions.

As used in this chapter:

- (1) "Administrator" means the person employed by the board to assist in administering personnel policies.
- (2) "Board" means the Career Service Review Board created by this chapter.
- (3) "Career service employee" means a person employed in career service as defined in Section 67-19-3.
- (4) "Employer" means the state of Utah and all supervisory personnel vested with the authority to implement and administer the policies of the department.
- (5) "Grievance" means:
  - (a) a complaint by a career service employee concerning any matter touching upon the relationship between the employee and his employer; and
  - (b) any dispute between a career service employee and his employer.
- (6) "Supervisor" means the person to whom an employee reports and who assigns and oversees the employee's work.

**History:** C. 1953, 67-19a-101, enacted by L. 1989, ch. 191, § 6; 1991, ch. 101, § 2; 1991, ch. 204, § 7.

**Amendment Notes.** — The 1991 amendment by ch. 101, effective April 29, 1991, added present Subsection (3); designated former Subsections (3) to (5) as present Subsections (4) to (6); and substituted "the policies of the department" for "the state's personnel policies" at the end of present Subsection (4).

The 1991 amendment by ch. 204, effective April 29, 1991, substituted "a career service" for "an" in present Subsections (5)(a) and (5)(b).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

**PART 2****CAREER SERVICE REVIEW BOARD****67-19a-201. Career Service Review Board created — Members — Appointment — Removal — Terms — Organization — Compensation.**

- (1) There is created a Career Service Review Board.
- (2) (a) The governor, with the advice and consent of the Senate, shall appoint five members to the board no more than three of which are members of the same political party.
  - (b) The governor shall appoint members whose gender and ethnicity represent the career service work force.
  - (c) The governor may remove any board member for cause and appoint a replacement to complete the unexpired term of the member removed for cause.
- (3) The governor shall ensure that appointees to the board:
  - (a) are qualified by knowledge of employee relations and merit system principles in public employment; and
  - (b) are not:
    - (i) members of any local, state, or national committee of a political party;
    - (ii) officers or members of a committee in any partisan political club; and
    - (iii) holding or a candidate for a paid public office.
- (4) (a) The governor shall appoint board members to serve four-year terms as follows:
  - (i) three members shall be appointed to a term beginning and ending with the governor's term; and
  - (ii) two members shall be appointed to four-year terms beginning January 1 of the third year of the governor's regular term in office.
- (b) The members of the board shall serve until their successors are appointed and qualified.
- (c) Persons serving on the board as of the effective date of this act may complete the term for which they were appointed.
- (d) If a vacancy occurs on the board, the governor may appoint a new person to fill the unexpired term.
- (5) Each year, the board shall choose a chairman and vice-chairman from its own members.
- (6) (a) Three members of the board are a quorum for the transaction of business.
  - (b) Action by a majority of members when a quorum is present is action of the board.
- (7) Members of the board shall serve without compensation, but they may be reimbursed for expenses incurred in the performance of their official duties as established by the Division of Finance.

**History:** C. 1953, 67-19a-201, enacted by L. 1989, ch. 191, § 7. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.  
**Effective Dates.** — Laws 1989, ch. 191 be-

### 67-19a-202. Powers — Jurisdiction.

- (1) (a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position that have not been resolved at an earlier stage in the grievance procedure.  
 (b) The board has no jurisdiction to review or decide any other personnel matters.
- (2) The time limits established in this chapter supersede the procedural time limits established in Title 63, Chapter 46b, Administrative Procedures Act.
- (3) In conjunction with any inquiry, investigation, hearing, or other proceeding, any member of the board may:
  - (a) administer oaths;
  - (b) certify official acts;
  - (c) subpoena witnesses, documents, and other evidence; and
  - (d) grant continuances pursuant to board rule.

**History:** C. 1953, 67-19a-202, enacted by L. 1989, ch. 191, § 8; 1991, ch. 101, § 3; 1991, ch. 204, § 8.

**Amendment Notes.** — The 1991 amendment by ch. 101, effective April 29, 1991, added Subsection (3)(d), making a related grammatical change, and made a change in the style of the chapter reference in Subsection (2).

The 1991 amendment by ch. 204, effective April 29, 1991, inserted "career service" before

"employees" in Subsection (1)(a), and "Administrative Procedures Act" after "Title 63" in Subsection (2).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

### 67-19a-203. Rulemaking authority.

The board may make rules governing:

- (1) definitions of terms, phrases, and words used in the grievance process established by this chapter;
- (2) what matters constitute excusable neglect for purposes of the waiver of time limits established by this chapter;
- (3) the application for and service of subpoenas, the service and filing of pleadings, and the issuance of rulings, orders, determinations, summary judgments, transcripts, and other legal documents necessary in grievance proceedings;
- (4) the use, calling, attendance, participation, and fees of witnesses in grievance proceedings;
- (5) continuances of grievance proceedings;
- (6) procedures in jurisdictional and evidentiary hearings, unless governed by Title 63, Chapter 46b, the Administrative Procedures Act;
- (7) the presence of media representatives at grievance proceedings; and

(8) procedures for sealing files or making data pertaining to a grievance unavailable to the public.

**History:** C. 1953, 67-19a-203, enacted by L. 1989, ch. 191, § 9. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.  
**Effective Dates.** — Laws 1989, ch. 191 be-

#### **67-19a-204. Administrator — Powers.**

(1) The board shall employ a person with demonstrated ability to administer personnel policies to assist it in performing the functions specified in this chapter.

(2) (a) The administrator may:

(i) assign qualified, impartial hearing officers on a per case basis to adjudicate matters under the jurisdiction of the board;

(ii) subpoena witnesses, documents, and other evidence in conjunction with any inquiry, investigation, hearing, or other proceeding; and

(iii) upon motion made by a party or person to whom the subpoena is directed and upon notice to the party who issued the subpoena, quash or modify the subpoena if it is unreasonable, requires an excessive number of witnesses, or requests evidence not relevant to any matter in issue.

(b) In selecting and assigning hearing officers under authority of this section, the administrator shall appoint hearing officers that have demonstrated by education, training, and experience the ability to adjudicate and resolve personnel administration disputes by applying employee relations principles within a large, public work force.

**History:** C. 1953, 67-19a-204, enacted by L. 1989, ch. 191, § 10; 1991, ch. 101, § 4. Effective Dates. — Laws 1989, ch 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.  
**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, added Subsection (2)(a)(iii) and made related changes.

### **PART 3**

#### **GRIEVANCE AND APPEAL PROCEDURES**

#### **67-19a-301. Charges submissible under grievance and appeals procedure.**

(1) This grievance procedure may only be used by career service employees who are not:

- (a) public applicants for a position with the state's work force;
- (b) public employees of the state's political subdivisions;
- (c) public employees covered by other grievance procedures; or
- (d) employees of state institutions of higher education.

(2) Whenever a question or dispute exists as to whether an employee is qualified to use this grievance procedure, the administrator shall resolve the question or dispute. The administrator's decision is reviewable only by the Court of Appeals.

(3) Any career service employee may submit a grievance based upon a claim or charge of injustice or oppression, including dismissal from employment, resulting from an act, occurrence, omission, or condition for solution through the grievance procedures set forth in this chapter.

**History:** C. 1953, 67-19a-301, enacted by L. 1989, ch. 191, § 11; 1991, ch. 101, § 5.

**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, added Subsections (1) and (2) and designated the former section as Subsection (3).

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

### **67-19a-302. Levels of appealability of charges submissible under grievance and appeals procedure.**

(1) A career service employee may grieve promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position to all levels of grievance procedure.

(2) (a) A career service employee may grieve all other matters only to the level of his department head.

(b) The decision of the department head is final and unappealable to the board.

**History:** C. 1953, 67-19a-302, enacted by L. 1989, ch. 191, § 12; 1991, ch. 204, § 9.

**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, substituted "A career service" for "An aggrieved" in Subsection (1).

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

### **67-19a-303. Employees' rights in grievance and appeals procedure.**

(1) For the purpose of processing a grievance, a career service employee may:

(a) obtain assistance by a representative of the employee's choice to act as an advocate at any level of the grievance procedure;

(b) request a reasonable amount of time during work hours to confer with the representative and prepare the grievance; and

(c) call other employees as witnesses at a grievance hearing.

(2) The state shall allow employees to attend and testify at the grievance hearing as witnesses if the employee has given reasonable advance notice to his immediate supervisor.

(3) No person may take any reprisals against any career service employee for use of grievance procedures specified in this chapter.

(4) (a) The employing agency of an employee who files a grievance may not place grievance forms, grievance materials, correspondence about the grievance, agency and department replies to the grievance, or other documents relating to the grievance in the employee's personnel file.

(b) The employing agency of an employee who files a grievance may place records of disciplinary action in the employee's personnel file.

(c) If any disciplinary action against an employee is rescinded through the grievance procedures established in this chapter, the agency and the



Department of Human Resource Management shall remove the record of the disciplinary action from the employee's agency personnel file and central personnel file.

(d) An agency may maintain a separate grievance file relating to an employee's grievance, but shall discard the file after three years.

**History:** C. 1953, 67-19a-303, enacted by L. 1989, ch. 191, § 13; 1991, ch. 204, § 10.  
**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, substituted "a career service" for "an" in Subsection (1).

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

## PART 4

### PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE

#### **67-19a-401. Time limits for submission of appeal by aggrieved employee — Voluntary termination of employment — Group grievances.**

(1) Subject to the standing requirements contained in Part 3 and the restrictions contained in this part, a career service employee may have a grievance addressed by following the procedures specified in this part.

(2) The employee and the person to whom the grievance is directed may agree in writing to waive or extend grievance steps 2, 3, or 4 or the time limits specified for those grievance steps, as outlined in Section 67-19a-402.

(3) Any writing made pursuant to Subsection (2) must be submitted to the administrator.

(4) (a) Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, he has waived his right to process the grievance or to obtain judicial review of the grievance.

(b) Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, the grievance is considered to be settled based on the decision made at the last step.

(5) (a) Unless the employee meets the requirements for excusable neglect established by rule, an employee may submit a grievance for review under this chapter only if the employee submits the grievance:

(i) within 20 working days after the event giving rise to the grievance; or

(ii) within 20 working days after the employee has knowledge of the event giving rise to the grievance.

(b) Notwithstanding Subsection (4)(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance.

(6) A person who has voluntarily terminated his employment with the state may not submit a grievance after he has terminated his employment.

(7) (a) When several employees allege the same grievance, they may submit a group grievance by following the procedures and requirements of this chapter.

(b) In submitting a group grievance, each aggrieved employee shall sign the complaint.

(c) The administrator and board may not treat a group grievance as a class action, but may select one aggrieved employee's grievance and address that grievance as a test case.

**History:** C. 1953, 67-19a-401, enacted by L. 1989, ch. 191, § 14; 1991, ch. 101, § 6; 1991, ch. 204, § 11.

**Amendment Notes.** — The 1991 amendment by ch. 101, effective April 29, 1991, substituted "grievance steps 2, 3, or 4 or the time limits specified for those grievance steps, as outlined in Section 67-19a-402" for "any grievance step or the time limits specified for any grievance step" at the end of Subsection (2); added present Subsection (3); and redesignated

former Subsections (3) to (6) as present Subsections (4) to (7).

The 1991 amendment by ch. 204, effective April 29, 1991, substituted "a career service" for "an aggrieved" in Subsection (1).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

### **67-19a-402. Procedural steps to be followed by aggrieved employee.**

- (1) (a) A career service employee who believes he has a grievance shall attempt to resolve the grievance through discussion with his supervisor.  
 (b) Within five days after the employee discusses the grievance with him, the employee's supervisor may issue a verbal decision on the grievance.
- (2) (a) If the grievance remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the supervisor's verbal decision, the employee may resubmit the grievance in writing to his immediate supervisor within five working days after the expiration of the period for response or receipt of the decision, whichever is first.  
 (b) Within five working days after the employee's written grievance is submitted, the employee's supervisor shall issue a written response to the grievance stating his decision and the reasons for the decision.  
 (c) Immediately after submitting the written grievance to his supervisor, the employee shall notify the administrator of the board that he has submitted the written grievance.
- (3) (a) If the written grievance submitted to the employee's supervisor remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to his agency or division director within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.  
 (b) Within five working days after the employee's written grievance is submitted, the employee's agency or division director shall issue a written response to the grievance stating his decision and the reasons for the decision.
- (4) (a) If the written grievance submitted to the employee's agency or division director remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to his department head within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

(b) Within ten working days after the employee's written grievance is submitted, the department head shall issue a written response to the grievance stating his decision and the reasons for the decision.

(c) The decision of the department head is final in all matters except those matters that the board may review under the authority of Part 3.

(5) If the written grievance submitted to the employee's department head meets the subject matter requirements of Section 67-19a-302 and if the grievance remains unanswered for ten working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to the administrator within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

**History:** C. 1953, 67-19a-402, enacted by L. 1989, ch. 191, § 15; 1989 (2nd S.S.), ch. 3, § 2; 1991, ch. 204, § 12.

**Amendment Notes.** — The 1989 (2nd S.S.) amendment, effective October 10, 1989, substituted "ten working days" for "five working days" in Subsection (4)(b).

The 1991 amendment, effective April 29, 1991, substituted "A career service" for "An" in Subsection (1)(a).

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

### **67-19a-403. Appeal to administrator — Jurisdictional hearing.**

(1) At any time after a career service employee submits a grievance to the administrator under the authority of Section 67-19a-402, the administrator may attempt to settle the grievance informally by conference, conciliation, and persuasion with the employee and the agency.

(2) (a) When an employee submits a grievance to the administrator under the authority of Section 67-19a-402, the administrator shall determine:

- (i) whether or not the employee is a career service employee and is entitled to use the grievance system;
- (ii) whether or not the board has jurisdiction over the grievance;
- (iii) whether or not the employee has been directly harmed; and
- (iv) the issues to be heard.

(b) In order to make the determinations required by Subsection (2), the administrator may:

- (i) hold a jurisdictional hearing, where the parties may present oral arguments, written arguments, or both; or
- (ii) conduct an administrative review of the file.

(3) (a) If the administrator holds a jurisdictional hearing, he shall issue his written decision within 15 days after the hearing is adjourned.

(b) If the administrator chooses to conduct an administrative review of the file, he shall issue his written decision within 15 days after he receives the grievance.

**History:** C. 1953, 67-19a-403, enacted by L. 1989, ch. 191, § 16; 1991, ch. 204, § 13.

**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, added present Subsection (2)(a)(i) and redesignated former

Subsections (2)(a)(i) through (2)(a)(iii) as present Subsections (2)(a)(ii) through (2)(a)(iv)

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

**67-19a-404. Administrator's responsibilities.**

If the administrator determines that the grievance meets the jurisdictional requirements of Part 3, he shall:

- (1) appoint a hearing officer to adjudicate the complaint; and
- (2) set a date for the hearing that is either:
  - (a) not later than 30 days after the date the administrator issues his decision that the board has jurisdiction over the grievance; or
  - (b) at a date agreed upon by the parties and the administrator.

**History:** C. 1953, 67-19a-404, enacted by L. 1989, ch. 191, § 17. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.  
**Effective Dates.** — Laws 1989, ch. 191 be-

**67-19a-405. Prehearing conference.**

- (1) The administrator may require the presence of each party, the representatives of each party, and other designated persons at a prehearing conference.
- (2) At the conference, the administrator may require the parties to:
  - (a) identify which allegations are admitted and which allegations are denied;
  - (b) submit a joint statement detailing:
    - (i) stipulated facts that are not in dispute;
    - (ii) the issues to be decided; and
    - (iii) applicable laws and rules;
  - (c) submit a list of witnesses, exhibits, and papers or other evidence that each party intends to offer as evidence; and
  - (d) confer in an effort to resolve or settle the grievance.
- (3) At the conclusion of the prehearing conference, the administrator may require the parties to prepare a written statement identifying:
  - (a) the items presented or agreed to under Subsection (2); and
  - (b) the issues remaining to be resolved by the hearing process.
- (4) The prehearing conference is informal and is not open to the public or press.

**History:** C. 1953, 67-19a-405, enacted by L. 1989, ch. 191, § 18. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.  
**Effective Dates.** — Laws 1989, ch. 191 be-

**67-19a-406. Procedural steps to be followed by aggrieved employee — Hearing before hearing officer — Evidentiary and procedural rules.**

- (1) (a) The administrator shall employ a certified court reporter to record the hearing and prepare an official transcript of the hearing.  
 (b) The official transcript of the proceedings and all exhibits, briefs, motions, and pleadings received by the hearing officer are the official record of the proceeding.
- (2) (a) The agency has the burden of proof in all grievances resulting from dismissals, demotions, suspensions, written reprimands, reductions in force, and disputes concerning abandonment of position.

- (b) The employee has the burden of proof in all other grievances.
- (c) The party with the burden of proof must prove their case by substantial evidence.
- (3) (a) The hearing officer shall issue a written decision within 20 working days after the hearing is adjourned.
- (b) If the hearing officer does not issue a decision within 20 working days, the agency that is a party to the grievance is not liable for any claimed back wages or benefits after the date the decision is due.
- (4) The hearing officer may:
  - (a) not award attorneys' fees or costs to either party;
  - (b) close a hearing by complying with the procedures and requirements of Title 52, Chapter 4, Open and Public Meetings Act;
  - (c) seal the file and the evidence produced at the hearing if the evidence raises questions about an employee's character, professional competence, or physical or mental health;
  - (d) grant continuances according to board rule; and
  - (e) decide questions or disputes concerning standing in accordance with Section 67-19a-301.

**History:** C. 1953, 67-19a-406, enacted by L. 1989, ch. 191, § 19; 1991, ch. 101, § 7.

**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, inserted the subdivision designation "(a)" in Subsection (4); designated former Subsections (5) and (6) as present Subsections (4)(b) and (4)(c); added

Subsections (4)(d) and (4)(e); and made stylistic changes and appropriate changes in phraseology.

**Effective Dates.** — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

### **67-19a-407. Appeal to Career Service Review Board.**

- (1) (a) The employee or the agency may appeal the hearing officer's decision on a grievance to the board if:
  - (i) the appealing party files a notice of appeal with the administrator within ten working days after the receipt of the decision or the expiration of the period for decision, whichever is first; and
  - (ii) the appealing party meets the requirements for appeal established in Subsection (2).
- (b) The appealing party shall submit a copy of the official transcript of the hearing to the administrator.
- (2) The employee or the agency may appeal the hearing officer's decision on a grievance to the board only if the appealing party alleges that:
  - (a) the hearing officer did not issue a decision within 20 working days after the hearing adjourned;
  - (b) the appealing party is dissatisfied with the decision;
  - (c) the appealing party believes that the decision was based upon an incorrect or arbitrary interpretation of the facts; or
  - (d) the appealing party believes that the hearing officer made an erroneous conclusion of law.

**History:** C. 1953, 67-19a-407, enacted by L. 1989, ch. 191, § 20.

**Effective Dates.** — Laws 1989, ch. 191 be-

came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

### **67-19a-408. Career Service Review Board hearing — Evidentiary and procedural rules.**

- (1) The board shall:
  - (a) hold a hearing to review the hearing officer's decision not later than 30 days after it receives the official transcript and the briefs;
  - (b) review the decision of the hearing officer by considering the official record of that hearing and the briefs of the parties; and
  - (c) issue its written decision addressing the hearing officer's decision within 40 working days after the record for its proceeding is closed.
- (2) In addition to whatever other remedy the board grants, it may order that the employee be placed on the reappointment roster provided for by Section 67-19-17 for assignment to another agency.
- (3) If the board does not issue its written decision within 40 working days after closing the record, the agency that is a party to the grievance is not liable for any claimed back wages or benefits after the date the decision is due.
- (4) The board may not award attorneys' fees or costs to either party.
- (5) The board may close a hearing by complying with the procedures and requirements of Title 52, Chapter 4, the Open and Public Meetings Act.
- (6) The board may seal the file and the evidence produced at the hearing if the evidence raises questions about an employee's character, professional competence, or physical or mental health.

**History:** C. 1953, 67-19a-408, enacted by L. 1989, ch. 191, § 21. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

**Effective Dates.** — Laws 1989, ch. 191 be-

## **CHAPTER 19b**

### **SUGGESTION AWARDS PROGRAM**

<b>Part 1</b>		<b>Section</b>	
<b>General Provisions</b>		67-19b-204.	Department coordinators — Appointment — Duties.
Section		67-19b-205.	Department committees — Appointment — Duties.
67-19b-101.	Definitions.		
67-19b-102.	Application of chapter.		
<b>Part 2</b>		<b>Part 3</b>	
<b>Administrative Structure</b>		<b>Evaluation and Awards Process</b>	
67-19b-201.	Director's responsibilities — Annual report.	67-19b-301.	Suggestion evaluation procedures — Administration.
67-19b-202.	Utah Suggestion Awards Board — Creation — Duties.	67-19b-302.	Suggestion evaluation procedures — Coordinator and board — Criteria — Ineligible suggestions.
67-19b-203.	Suggestion awards administration — Appointment — Duties.	67-19b-303.	Awards.

R. PAUL VAN DAM - 3312  
Attorney General  
DAN R. LARSEN - 4865  
STEVEN G. SCHWENDIMAN - 2891  
Assistant Attorney General  
Attorneys for Defendants  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1016

JUL 10 1992

SALT LAKE COUNTY  
By [Signature]  
Deputy Clerk

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

---

DAWN ALUMBAUGH,	:	
Plaintiff,	:	
vs.	:	ORDER OF DISMISSAL
UTAH STATE INSURANCE	:	
DEPARTMENT, by and through	:	Civil No. 920900062CV
its Commissioner and	:	
Authorized Representative,	:	
HAROLD C. YANCEY,	:	Judge Richard H. Moffat
Defendant.	:	
	:	

---

The above captioned matter came on for hearing before this Court for oral argument on defendant's Motion to Dismiss the Amended Complaint on June 12, 1992, at the hour of 9:00 a.m. Plaintiff was represented by David H. Schwobe. Defendant was represented by Dan R. Larsen and Steven G. Schwendiman, Assistant Attorneys General. Having reviewed the memorandums and heard the arguments of counsel, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Defendant's Motion to Dismiss the Amended Complaint is granted for the reason that plaintiff has failed to exhaust

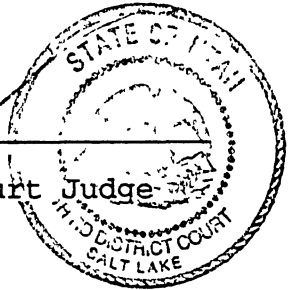
the administrative and statutory remedies for the review of grievance procedures.

2. Plaintiff's Amended Complaint is dismissed without prejudice.

DATED this 10<sup>th</sup> day of July, 1992.

BY THE COURT:

Richard H. Moffat  
RICHARD H. MOFFAT  
Third District Court Judge



APPROVED AS TO FORM:

David H. Schwobe 6/16/92  
DAVID H. SCHWOBE  
Attorney for Plaintiff

#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing ORDER OF DISMISSAL, postage prepaid, this 12 day of JUNE, 1992, to the following:

David H. Schwobe  
PERKINS, SCHWOBE & McLACHLAN  
Attorney for Plaintiff  
343 South 400 East  
Salt Lake City, Utah 84111

Betty Schofield



FORE THE CAREER SERVICE REVIEW BOARD OF THE STATE OF UTAH

---

In The Matter Of:

DAWN ALUMBAUGH,

Grievant.

:  
:  
:  
:  
:  
:

JURISDICTIONAL  
DECISION AND  
SUMMARY RULING

Case No. J.H. 38 (1990)

---

On May 11, 1990, Dawn Alumbaugh ("Grievant"), filed a request to advance her grievance, dated April 5, 1990, to the Step 5/evidentiary level of the State Employees' Grievance and Appeal Procedures. (*Utah Code Ann.* §§67-19a et seq.) Ms. Alumbaugh filed a timely request with the Career Service Review Board Office ("CSRB"). However, it is appropriate to examine and determine whether Grievant's April 5, 1990 grievance qualifies for advancement beyond the level of the department head at Step 4 of the Grievance Procedures. Consequently, this administrative review is being conducted pursuant to §67-19a-403(2), with particular reference to paragraphs (b)(ii) of the just-cited statutory section.

BACKGROUND

Grievant's original statement of grievance reads as follows:

I had worked in my past position as a satisfied employee for 6 years. My performance evaluations have all been satisfactory until our division received a new supervisor. Problems developed due to [me] not meeting [my] supervisor's expectations and not receiving adequate training. I informed her supervisor of the problems [that] I was experiencing and he informed me that he sympathized with my situation and would talk to the Personnel Director about a solution. He did ask [me] if I wanted to talk with her but realizing the consequences, I opted not to.

Grievant then continued her statement of grievance on an accompanying sheet of paper, most of which constitutes Ms. Alumbaugh's version of how she came to be transferred from a position in the Insurance Department's ("Department") Solvency and Surveillance Division ("Solvency Division") to another position, one which is in the Market Conduct Division. Grievant further stated: "I was not given the opportunity to meet performance standards

In my previous position, as there were none written as a guideline for me to follow and meet." Additionally, Ms. Alumbaugh asserted that management had failed to comply with Department of Human Resource Management's ("DHRM") rule R468-10-2(1). This rule states that: "The supervisor shall discuss the substandard performance with the employee in an attempt to discover the reasons therefore and set forth an appropriate written plan." Grievant claims that management failed to fully comply with this rule prior to her position transfer. Ms. Alumbaugh concluded her statement of grievance by writing: "I want to make it clear that I am grieving the way this administrative action was handled, as if proper steps would have been administered, I would have had the opportunity to make adjustments in my performance to meet expectations of the position."

Moreover, Grievant stated her remedy or relief as follows: "Desk Audit to Insurance Technician II, Grade 17. Damages for emotional distress, embarrassment. Equal consideration for salary upgrades in the future."

#### ADMINISTRATIVE REVIEW

The undersigned has determined that an administrative review of the record (i.e., case file) is sufficient to reach a determination on the jurisdictional issues at §67-19a-403(2)(a). The following pieces of correspondence adequately represent the positions of the Grievant and management:

- Grievance and attachment, dated April 5
- Step 2 Reply, Vanna Hunter to Dawn Alumbaugh, dated April 19
- Employee Performance Review for Grievant, dated April 6
- Grievant to Undersigned, dated April 12
- Step 3 Reply, Lennard Stillman to Grievant, dated April 20
- Grievant to Harold Yancey, dated April 17
- Step 4 Reply, Harold Yancey to Grievant, dated May 10
- Appeal to Step 5, Grievant to Undersigned, dated May 11

The file record also contains several other documents, which are not germane to the ultimate issue under consideration, which is whether Grievant is entitled to advance her

grievance to Step 5.

## FINDINGS

Concededly, there are some discrepancies with regard to the factual situation of when certain meetings were held and of the exact content or discussions that occurred. The undersigned has carefully examined the above-cited documents. The following findings of fact represent this examiner's best efforts to sort out the factual background. Conceivably, there may indeed be some slight errors, but the overall substance is corroborated in the documents.

1. The Department created a new Solvency Division in November 1989. Lennard Stillman was appointed as division director. Vanna Hunter was appointed to be a supervisor over one of the two sections within that division. Ms. Hunter was assigned to supervise Ms. Alumbaugh. The latter substantially continued with her same duties and responsibilities which she had performed prior to the reorganization, but there were also some new procedures and tasks assigned to her.

2. According to Ms. Alumbaugh, she met with Mr. Stillman on February 20 and explained to him the problems "[she] was having with the training practices [she] received under Ms. Hunter." Mr. Stillman placed this meeting in "approximately early March 1990." The discrepancy in dates is of minor import, and conceivably more than one meeting may have occurred.

3. Both Ms. Alumbaugh and Mr. Stillman concur that Grievant expressed some dissatisfaction with being supervised by Ms. Hunter. Mr. Stillman proposed finding another position in the Department for Grievant, and she agreed to his suggestion. Soon thereafter, Mr. Stillman discussed Grievant's dissatisfaction and problems with Olga Tsakakis, Personnel Coordinator/Director of Administrative Services. Ms. Tsakakis offered to evaluate the request of a reassignment for Ms. Alumbaugh. Ms. Tsakakis then considered the idea of reassigning two Insurance Tech 15 incumbents (Ms. Alumbaugh and

Ms. Christensen) after she considered the skills and abilities of both women. Later, Ms. Tsakakis determined that it would be in the best interests of the Department to have Ms. Alumbaugh and Sandra Christensen each accept a mutual exchange of positions within the Department. Ms. Tsakakis then made the same recommendation to Commissioner Harold C. Yancey.

4. On March 20, Commissioner Yancey met with the Grievant and discussed with Ms. Alumbaugh the prospect of a job-swap between her position and Ms. Christensen's position. The Commissioner's account of that meeting is that while Ms. Christensen wanted the weekend to "think it over," Ms. Alumbaugh made an "on-the-spot" decision to accept the reassignment of positions. Mr. Stillman's account is similar in that he stated that while Grievant would have liked to stay in the Solvency Division, Grievant also acknowledged that she "would accept a change irrespective of duties." A few days later, the Commissioner again met at length with Ms. Alumbaugh regarding the proposed transfer, which in fact, gave her some additional time to think about the exchange.

MADE  
UNDER  
DRAFT  
DID NOT  
AGREE  
TO  
ACTION  
SECOND MEETING  
APPROX. 7:45 PM

5. There has been no showing of coercion with respect to Grievant's transfer. She discussed the proposal beforehand with Commissioner Yancey, Mr. Stillman, and Ms. Tsakakis according to three different accounts. Grievant wrote on April 17 to the undersigned that, "At no time did I ever request the action that Mr. Stillman referred to as a transfer." Ms. Alumbaugh's statement appears to be accurate; she did not raise the transfer prospect, but Mr. Stillman did. However, there is no showing of evidence that she objected to the prospect of a transfer, when she discussed it with Mr. Stillman, Ms. Tsakakis, and Commissioner Yancey. The accounts by Commissioner Yancey and Mr. Stillman state that Grievant willingly and knowingly accepted the new assignment in the Market Conduct Division. Regardless, even if Grievant had forthrightly objected to the change of duties and assignments between the two divisions, management has sufficient discretion to direct and control the work force, including changing employees' duties and responsibilities as long as the assigned duties are within the context of employees' meeting minimum qualifications and the assigned work is within the scope of the appropriate DHRM class specification. (See DHRM R468-2-3 and R468-5-5.(5).) Indeed, the personnel action taken in the instant case

DID NOT  
DISCUSS  
W/ MR.  
YANCEY  
MR. STILL  
MAN.  
TSAK  
KIS.  
MR. STILL  
MAN  
NOT GIVING  
CHANCE  
TO OBJECT  
K. F. B. B. B.  
WAS A  
DECISION  
FOR MY  
POSITION

falls within the ambit of both "Reassignment" as well as "Transfer" as those terms are defined in DHRM R468-1-1 Definitions.

TRANSFER - SENDS A JCB SPECS - NOT QUALIFIED FOR NEW POSITION

6. Grievant's now former supervisor, Ms. Hunter, did not initiate Grievant's transfer from the Solvency Division. Even if Ms. Hunter had wanted to transfer Grievant into the other division, she clearly lacked such authority.

7. Grievant asserts that management violated DHRM R468-10-2.(1) by the supervisor (Ms. Hunter) not previously discussing substandard performance with Grievant prior to implementing the corrective action of a transfer under R468-10-2.(2)(d). However, there has been no showing that a Corrective Action Plan was either implemented or even contemplated at any time. Quite the contrary, Ms. Hunter's Step 2 reply and Mr. Stillman's Step 3 reply stated explicitly that no Corrective Action Plan had been implemented on Ms. Alumbaugh; nor does Commissioner Yancey's Step 4 reply mention such an action. As there was no implementation of a Corrective Action Plan, there could have been no violation of a rule pertaining to the implementation of a Corrective Action Plan, as claimed by Grievant.

R 468-10-2  
CORRECTIVE ACTION SHOULD HAVE BEEN IMPLEMENTED  
RE: 2a, 2b, 2c, 2d - MS HUNTER, SUPERV., IS DUTY

8. Ms. Alumbaugh received an employee performance review for the period October 1, 1989, through April 1, 1990, from Supervisor Hunter, which Grievant signed on April 9, 1990. This just-mentioned review evaluated Grievant's job performance as being overall satisfactory for the six months' period. Grievant received the review after she had transferred to her new position in the Market Conduct Division. Grievant claims that: (1) she was not given an opportunity to meet performance standards, (2) she did not receive adequate training guidelines prior to the transfer, and (3) that the evaluation was based upon a training period that lasted only approximately one month. By accepting a transfer outside of Supervisor Hunter's area of responsibility, Grievant's complaints on the evaluation process are moot although it was not inappropriate for management to evaluate Ms. Alumbaugh's performance for the period of work performed in the Solvency Division. Opportunity was afforded for Grievant to comment on the evaluation, which she did. DHRM R468-2-5.(3) also provides state employees with the opportunity to challenge,

~~is~~correct, or amend any information in the individual's personnel file.

## CONCLUSIONS

1. *Utah Code Annotated* §67-19a-301 states: "Any career service employee may submit a grievance based upon a claim or charge of injustice or oppression, including dismissal from employment, resulting from an act, occurrence, omission, or condition for solution through the grievance procedures set forth in this chapter." Ms. Alumbaugh's grievance of April 5, 1990, falls within this ambit.

2. §67-19a-302 states:

(1) An aggrieved employee may grieve promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position to all levels of the grievance procedures.

(2)(a) A career service employee may grieve all other matters only to the level of his department head.

(b) The decision of the department head is final and unappealable to the board.

The Career Service Review Board lacks jurisdiction to hear Grievant's gravamen at Step 5 of the Grievance Procedures, and Grievant lacks standing to process her grievance to Step 5 for an evidentiary hearing because her grievance does not comport with §67-19a-302(1).

3. A complaint or grievance based upon the personnel action of a transfer or reassignment may not qualify on its face for advancement to the Step 5/evidentiary level of the State Employees' Grievance and Appeal Procedures; nor does §67-19a-302 permit grievances based upon performance review to be advanced beyond Step 4.

4. Furthermore, it is concluded that Grievant's requested remedies are inappropriate

to the Grievance Procedures based on the following:

(a) Requests for desk audits and all classification appeals are not within the scope of the Insurance Department, but require application to DHRM (§67-19-31 and R468-4-5), nor do these matters come under the jurisdiction of the CSRB.

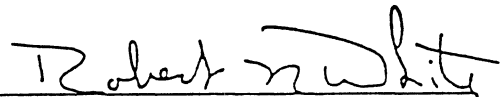
(b) The CSRB lacks remedy powers over monetary awards for embarrassment and emotional distress. Such complaints may be petitioned through the general courts. The CSRB may not even award attorney's fees. (§67-19a-408(4).)

(c) Any future salary increases are a prospective (future-oriented) matter, and the award or lack of award of future increases can only be treated at the time of occurrence. Grievant's requested remedy anent future salary increases is now premature. A grievance may always be filed coincident with any future award or the denial of an award on salary increase matters, but there is no present injury or harm cited in the instant grievance which may be treated at this time.

### DECISION

The instant grievance is hereby summarily dismissed from the docket of the Career Service Review Board with prejudice. (R140-1-16 F.) This ruling constitutes final agency action on this matter for purposes of the *Utah Administrative Procedures Act*, §63-46b-14(3)(a).

DATED this 21st day of May, 1990.

  
Robert N. White  
Administrator  
Career Service Review Board

For any judicial review of this Jurisdictional Decision and Summary Ruling, petition must be made within 30 days from the date of issuance with the Utah Court of Appeals. (§§63-46b-14 and 63-46b-16.)